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No. 01-83

IN THE

Supreme Court of the United States

REDDWARF STARWARE, LLC,

Petitioner,

v.

MEADE INSTRUMENTS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Meade Instruments Corp., has no parent company and no publicly held company owns 10% or more of its stock.

There are no subsidiaries or affiliates of Meade Instruments Corp. that have issued shares to the public.

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REASONS FOR DENYING THE WRIT

In its Petition for Writ of Certiorari, Petitioner, Reddwarf Starware, LLC, posits two questions that it contends are presented by the proceedings below. The first is whether this Honorable Court's decision in *FirsTier Mortgage Co. v. Investor's Mortgage Ins. Co.*, 498 U.S. 269, 111 S. Ct. 648, 112 L. Ed. 2d 743 (1991), mandates rejection of the "cumulative finality" doctrine of appellate jurisdiction. *See* Pet. at *i*. The second question is whether Rule 2 of the Federal Rules of Appellate Procedure compels a Court of Appeals to "suspend the customary rules of finality . . . [i]n the absence of prejudice and in the interest of justice" under the facts outlined in Petitioner's version of the proceedings below. *Id.* Petitioner argues that the Federal Circuit's dismissal of its appeal conflicted with the "vast majority of decisions addressing the issue following" this Court's decision in *FirsTier*. . . ." *Id.* at 6-7.

In reality, neither the Federal Circuit's opinion nor the record below fairly raises the questions posited by Petitioner. Far from being contrary to the "vast majority" of decisions following *FirsTier*, the dismissal of Petitioner's appeal was consistent with all such decisions that have been cited by Petitioner or are known to Respondent. In no such decision has relief ever been granted to an appellant like Petitioner, a party that filed its notice of appeal from an order that it knew — indeed, avowed — to be nonappealable, but then inexplicably failed to appeal after entry of the final judgment.

In *FirsTier*, this Court squarely held that Rule 4(a)(2) of the Federal Rules of Appellate Procedure had codified the "cumulative finality" doctrine (also sometimes called the "judicial cure" doctrine) formerly existing in case law, and

this Court set forth the circumstances in which that doctrine could apply. While there have been a few subsequent lapses by courts that failed to recognize or failed to correctly apply *FirsTier* in a particular case, these fall far short of a meaningful split among the circuits that might justify the exercise of this Court's jurisdiction. Moreover, none of these decisions comes close to supporting relief for an appellee that conducted itself as Petitioner has. Whatever minor issues have arisen following *FirsTier*, there is unanimous accord that a party like Petitioner is entitled to no relief. Thus, Petitioner not only raises issues that this Court has no reason to address, but does so in a case where resolution of those issues would not be dispositive. Respondent therefore urges denial of the Petition for Writ of Certiorari.

I.

THERE IS NO SPLIT BETWEEN THE CIRCUITS OF THE KIND SUGGESTED BY PETITIONER.

Petitioner seeks certiorari on the ground that the Federal Circuit's dismissal of Petitioner's appeal has created a conflict with the "vast majority" of decisions following this Court's decision in *FirsTier*. Pet. at 6-7. The cases cited by Petitioner, however, fail to support that characterization. In fact, the Federal Circuit's dismissal order closely followed the reasoning of *FirsTier* itself, in which this Court held that "Rule 4(a)(2) was intended to codify a general practice in the courts of appeals of deeming certain premature notices of appeal effective." 498 U.S. at 273; *see* Pet., App. at 4-8. In the face of that clear guidance from this Court, the lower courts have generally had little difficulty in recognizing that Rule 4(a)(2), as interpreted in *FirsTier*, provides the only basis on which a premature notice of appeal may ripen into

an effective notice following entry of final judgment. *See, e.g.*, *United States v. Cooper*, 135 F.3d 960, 963 (5th Cir. 1998) ("*FirsTier* allows premature appeals only where there has been a final decision, rendered without formal judgment."); *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993) (applying *FirsTier* to conclude that "a litigant seeking to take advantage of Rule 4(a)(2)'s saving provision must continue to be reasonably 'confuse[d] as to the status of the litigation' . . . until final judgment is actually entered.").

Far from constituting the "vast majority" of post-*FirsTier* decisions, the cases cited by Petitioner are isolated anomalies. While some of them might have warranted correction by a court of error, none merits the attention of this Court. *See* S. Ct. R. 10.

A case in point is *Fadem v. United States*, 42 F.3d 533 (9th Cir. 1994), *cert. granted, judgment vacated, and case remanded for further consideration*, 520 U.S. 1101 (1997), *opinion reinstated at* 164 F.3d 1242 (9th Cir. 1999), *opinion withdrawn, appeal dismissed*, 172 F.3d 648 (9th Cir. 1999). In that case, the panel majority failed even to notice the existence of *FirsTier*. Its opinion with respect to premature notices of appeal has not been followed by any published decision of a circuit or district court. While courts occasionally cite *Fadem* or its pre-*FirsTier* predecessors in passing, out of an apparent lack of attentiveness, there is no sign of any true, ongoing conflict between the laws of the Ninth and Federal Circuits with respect to the effect of *FirsTier*. *See In re Jack Raley Construction, Inc. v. Homestead Development Co., Inc.*, 17 F.3d 291, 294 (9th Cir. 1994) (holding that *FirsTier* demands that a premature appeal be dismissed when Rule 4(a)(2) does not apply).

Similarly, Petitioner's citation to *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 379 (5th Cir. 1996), does not establish a split between the Fifth and Federal Circuits. On the contrary, in *United States v. Cooper*, 135 F.3d 960, 963 (5th Cir. 1998), the Fifth Circuit held that its earlier, *Barrett* decision had "[not] found it necessary to decide the issue" of whether the circuit's expansive case law on curing premature appeals had survived *FirsTier*. The court then resolved that issue in a manner entirely consistent with the opinion of the Federal Circuit. *See id.* ("Today we recognize that in light of *FirsTier*, this expansive view of appellate jurisdiction cannot survive.").

Finally, a grant of certiorari is not warranted by the Third Circuit's decision in *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 178 (1999). In that case, the court addressed the effect of *FirsTier*, Rule 4(a)(2), and Rule 4(a)(4) in the specific context of a class action judgment's plan for allocating proceeds among class members. *See Lazy Oil*, 166 F.3d at 583. Regardless of the merits of that ruling, it is neither a matter of major importance nor closely related to the issues raised by Petitioner's appeal. This Court declined to review *Lazy Oil* in 1999, 120 S. Ct. 178, and there is no indication that certiorari would be any more appropriate today. On the contrary, the decision below is similar to those in, for example, *Cooper* and *Strasburg*, thus adding nothing to the grounds for certiorari. *See Cooper*, 135 F.3d at 963; *Strasburg*, 1 F.3d at 472-73; Pet., App. at 6-8.

II.

BECAUSE OF ITS UNIQUE FACTS, THIS CASE PRESENTS AN INAPPROPRIATE VEHICLE FOR ADDRESSING ANY ISSUES CONCERNING *FIRSTIER* OR THE JUDICIAL CURE DOCTRINE.

Even if the post-*FirsTier* decisions of the various circuits somehow called out for reconciliation by this Court, the present Petition would present a singularly inappropriate occasion for undertaking such a task. Because Petitioner knowingly appealed from a nonappealable order, and even acknowledged at the time that it had done so, Petitioner could not qualify for relief even if there remained a "judicial cure" doctrine beyond that provided by Rule 4(a)(2).

Certainly, Petitioner cannot qualify for relief under any plausible interpretation of *FirsTier*. In that decision, this Court held that Rule 4(a)(2) can apply only when two independent requirements are met. First, the order from which appeal is taken must be one that "***would be*** appealable if immediately followed by the entry of judgment." *FirsTier*, 498 U.S. at 276. Second, the litigant prematurely filing a notice of appeal must have done so because it "reasonably but mistakenly believe[d]" in the finality of the decision from which it was attempting to appeal. *Id.*

Petitioner can have no hope of satisfying either one of these core requirements of *FirsTier*. To begin with, the district court order from which Petitioner purported to appeal was plainly not final, because it disposed of neither Meade's federal antitrust nor its state unfair competition claims. Those claims were pending until nearly six months after Petitioner filed its notice of appeal. *See* Pet., App. at 2. Neither the

later negotiated disposition of those claims nor Petitioner's self-serving and factually unsupported characterizations of them as "receiv[ing] little attention," Pet. at 4, can change these facts.

Additionally, Petitioner knew and admitted at the time it filed its notice of appeal that the notice was directed to an order that was neither final nor appealable. It was this knowledge that prompted Reddwarf to unsuccessfully seek certification of the order for interlocutory appeal under Rule 54(b) of the Federal Rules of Civil Procedure. In its motion for certification, Petitioner admitted that, "[b]ecause there are still several outstanding causes of action, including Meade's anti-trust and unfair competition claims, [Petitioner] *is currently unable to appeal* the Court's earlier determinations." *Infra*, App. at 3a (emphasis added); *see also id.* at 5a (admitting that, because "there are still several outstanding unadjudicated claims in this case[,] . . . the personal jurisdiction and non-infringement judgments *are currently unappealable*." (emphasis added)). These admissions, which Petitioner submitted to the district court on the same day it filed its notice of appeal, Pet., App. at 1, preclude it from now asserting that it had *any* belief — let alone a reasonable belief — in the finality of the order from which it purported to appeal. In making its decision, the Federal Circuit emphasized Petitioner's knowledge of the non-appealability of the order. *See id.*, App. at 6 ("[I]mportantly, Reddwarf's motion for Rule 54(b) certification belies any notion that it was under the mistaken impression that the district court's order was final and appealable.").

Besides failing to meet the express requirements of *FirsTier*, Petitioner could not even meet the possibly less

restrictive requirements of the pre-*FirsTier* case law on "judicial cure." For one thing, "judicial cure" cases generally confine relief to appellants who had filed their notices of appeal at a time when only ministerial acts remained to be performed, not when entire claims remained unresolved. *See, e.g., In re Jack Raley Construction*, 17 F.3d at 294. As much as Petitioner may insist otherwise, disposition of multiple untried counterclaims can hardly be regarded as a "ministerial" act. *See* Pet., App. at 7.

Additionally, none of the cases cited by Petitioner, or their pre-*FirsTier* predecessors, grant relief to a litigant situated like Petitioner. In none of those cases was the court confronted with a litigant that acknowledged that its notice of appeal had been taken from a non-appealable order but then, when a final judgment was entered, chose to rely on the earlier notice it already knew to be invalid. The purpose of the judicial cure doctrine was to protect litigants against inadvertent errors, not against knowing disregard for appeal requirements. This Court has recognized as much in interpreting the rule codifying the judicial cure doctrine. *See FirsTier*, 498 U.S. at 276 ("Rule 4(a)(2) was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment.") Accordingly, this case presents no issue that has divided the circuits or could usefully be addressed by this Honorable Court.

III.

RULE 2 OF THE FEDERAL RULES OF APPELLATE PROCEDURE PROVIDES NO GROUND FOR GRANTING THE PETITION.

The second issue listed by Petitioner is merely an afterthought — an issue to which, here as before the Federal Circuit, Petitioner devotes little more than a page. Notably, Petitioner fails to identify any conflict or precedential point of law that it would have this Court address with respect to Rule 2 of the Federal Rules of Appellate Procedure. *See* Pet. at 16-17. Instead, Petitioner merely provides a highly slanted summary of the unique facts of this case and asks this Court to determine that, under such facts, Rule 2 should dictate a different result than the one reached by the Federal Circuit. *See id.* at 17 (arguing that the facts presented "good cause" for curing the prematurity of its notice of appeal and that "[o]nly by hearing the appeal on the merits can manifest injustice be avoided.").

While the Federal Circuit reached the correct result, there is no need for this Court to confirm this. *See* S. Ct. R. 10 ("[A] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Petitioner's argument about the applicability of Rule 2 to the specific facts of a single case is not worthy of this Court's attention and does not provide a basis for granting the Petition.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — MOTION TO CERTIFY ISSUES OF NON-INFRINGEMENT AND PERSONAL JURISDICTION FOR APPEAL IN ACCORDANCE WITH FED. R. CIV. PROC. 54(b), MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF JAKE A. TAYLOR [EXHIBITS OMITTED] DATED JULY 26, 1999

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA DIVISION

Case No. SA CV 98-240 GLT (ANx)

MEADE INSTRUMENTS CORPORATION,

Plaintiff,

v.

REDDWARF STARWARE, LLC, also known as REDDWARF INSTRUMENTS, LLC,

Defendant.

AND RELATED COUNTERCLAIM.

Appendix

MOTION TO CERTIFY ISSUES OF NON-INFRINGEMENT AND PERSONAL JURISDICTION FOR APPEAL IN ACCORDANCE WITH FED. R. CIV. PROC. 54(B); MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JAKE A. TAYLOR AND EXHIBITS IN SUPPORT THEREOF

Hon. Gary L. Taylor

DATE: August 23, 1999
TIME: 10:00 a.m.
DEPT: 10-D

I. INTRODUCTION AND BACKGROUND

On March 10, 1998, Plaintiff Meade Instruments Corporation ("Meade") filed a complaint against Reddwarf Starware, LLC a/k/a Reddwarf Instruments, LLC ("Reddwarf") for declaration of patent invalidity, patent unenforceability and non-infringement and antitrust violations and unfair competition. On April 6, 1998, Reddwarf filed a motion to dismiss for lack of personal jurisdiction. On May 11, 1998, this Court entered an Order Denying Defendant's Motion to Dismiss. (*See* Exhibit "A" to Declaration of Jake A. Taylor ("Taylor Decl.") attached hereto and incorporated herein by reference). Reddwarf subsequently filed a motion for certification and stay which this Court denied on or about May 22, 1998. (*See* Taylor Decl., Exhibit "B", attached hereto and incorporated herein by reference). Although the Court's Order entered a finding that there was personal jurisdiction over Reddwarf, the Order did not have an express determination stating no just reason for delay pursuant to Federal Rule of Civil Procedure 54(b) ("Rule 54(b)"). (*See* Ex. A).

Appendix

On June 4, 1998, Reddwarf filed an answer to the complaint, as well as a counterclaim against Meade for patent infringement. After discovery, Meade filed motions for summary judgment of patent invalidity and non-infringement. On or about June 30, 1998, this Court granted Meade's motion for summary judgment of non-infringement which rendered Meade's patent invalidity and unenforceability claims moot.

Pursuant to the Court's request Meade drafted and filed the Judgment After Granting Meade's Motions for Summary Judgment (the "Judgment") which the Court entered on July 2, 1999. (*See* Taylor Decl., Exhibit "C" attached hereto and incorporated herein by reference). The Judgment states that as a result of granting Meade's motion for summary judgment of non-infringement, ". . . the Court directs the entry of a final and appealable judgment forthwith on the non-infringement claims in conformity herewith." (*See* Ex. C). Despite the entry of judgment on the non-infringement issue, the Judgment does not have an express determination of no just cause for delay pursuant to Rule 54(b).

Because there are still several outstanding causes of actions, including Meade's antitrust and unfair competition claims, Reddwarf is currently unable to appeal the Court's earlier determinations because of the lack of express determination of no just cause for delay. Accordingly, Reddwarf requests this Court to certify the issues of personal jurisdiction and non-infringement for appeal in accordance with Federal Rule of Civil Procedure 54(b) ("Rule 54(b)").

Reddwarf also hereby informs that the Court that it will also be filing a motion for relief of judgment pursuant to

Fed. R. Civ. Proc. 60(b). The outcome of that motion may render this Motion moot.

II. PURPOSE OF RULE 54(b)

Prior to the promulgation of the Federal Rules of Civil Procedure, jurisdiction of the court of appeals was limited exclusively to "final decisions of the district courts of the United States." 28 U.S.C. §1291. In the interest of better judicial administration, Congress enacted Rule 54(b) to "relax . . . the restrictions upon what should be treated as a judicial unit for the purposes of appellate jurisdiction." *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 432, 76 S.Ct. 895, 897 (1956). Rule 54(b) provides a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions.

Rule 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an *express determination that there is no just reason for delay* and upon an *express direction for entry of judgment.*

Fed. R. Civ. Proc. 54(b) (emphasis added). Rule 54(b) allows a district court to sever an individual claim that has been finally resolved. Rule 54(b) acknowledges the policy that in

multiple claim actions "some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on *all* of the claims. *Id.* (emphasis in original). Rule 54(b) is limited expressly to multiple claims actions in which one or more, but less than all of the multiple claims have been finally decided and are found otherwise to be ready for appeal. In order for one or more, but less than all multiple claims to become appealable, district court must make both an express determination that there is no just reason for delay *and* an express direction for entry of judgment.

Meade has asserted multiple claims against Reddwarf including patent invalidity, patent unenforceability and non-infringement and antitrust violations and unfair competition. On or about May 11, 1998 and July 2, 1999 this Court entered final judgment as to the issues of personal jurisdiction and non-infringement, respectively. Although the Court expressly directed judgment of personal jurisdiction and non-infringement in each instance, the Court did not include an express determination of no just cause for delay.

Despite the adjudication of these issues, there are still several outstanding unadjudicated claims in this case. As a result, the personal jurisdiction and non-infringement judgments are currently unappealable. Because there is already entry of final judgment and there is no just reason for delay, the personal jurisdiction and non-infringement issues should be certified for appeal in accordance with Rule 54(b).

III. BECAUSE THE NON-INFRINGEMENT AND PERSONAL JURISDICTION CLAMS HAVE BEEN FINALLY ADJUDICATED AND THERE IS NO JUST CAUSE FOR DELAY, THIS COURT SHOULD CERTIFY AN APPEAL IN ACCORDANCE WITH RULE 54(b)

Courts analyzing whether Rule 54(b) applies must focus on both the finality of the judgment and whether there is any just reason for delay. *Sears*, 35 U.S. at 452, 76 S.Ct. at 908. The issues of non-infringement and personal jurisdiction have been briefed by both parties, orally argued and ruled upon by this Court. In fact, this Court has expressly entered judgment on both issues. In addition, there is no just cause for delay as both issues are separate and distinct from other unadjudicated claims in this case. As a result, this Court should certify an appeal in accordance with Rule 54(b).

A. Finality of the Decision

In order for rule 54(b) to apply, the judgment must be final with respect to one or more claims. A district court's judgment is final where it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 524 U.S. 229, 233, 65 S.Ct. 631, 633 (1945). The requirement of finality is a statutory mandate and not a matter of discretion. *See Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742, 96 S. Ct. 1202, 1206 (1976).

The Supreme Court has rejected the view that the mere recitation of finality and "no just reason for delay" by the

district court pursuant to Rule 54(b) automatically renders a judgment appealable as a final decision pursuant to 28 U.S.C. §1291 (1988). *Id.* Because the appellate court will review the certification of a Rule 54(b) claim, the "district court, cannot in the exercise of its discretion, treat as "final" that which is not final within the meaning of §1291. *Sears*, 351 U.S. at 437, 76 S. Ct. at 901. It must be a judgment in the sense that "it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is 'an ultimate disposition of an individual claim entered in the course of multiple claims action.' " *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7, 100 S.Ct. 1460, 1464 (1980).

1. Personal Jurisdiction

On April 6, 1998, Reddwarf filed a motion to dismiss for lack of personal jurisdiction. (*See* Ex. A). On May 11, 1998, this Court denied Reddwarf's Motion to Dismiss. Reddwarf subsequently filed a request for certification and stay pursuant to 28 U.S.C. § 1292(b) on May 14, 1998. In the Minute Order dated May 22, 1998, this Court denied Reddwarf's request for certification stating that "the Court does not find the issues presented . . . warrant *immediate* appeal." (*See* Ex. B (emphasis added)).

Although not expressly stated, the Minute Order was a final judgment on Reddwarf's claim of lack of personal jurisdiction. By denying Reddwarf's request for certification, the Court foreclosed any further adjudication concerning the issue at the district court level. Reddwarf had no other choice, but to proceed with the merits of the case in the district court. Now that the main issues of infringement and invalidity have

been resolved, Reddwarf should be given the opportunity to appeal the Court's denial of its Motion to Dismiss for lack of personal jurisdiction.

2. Non-Infringement

On or about June 30, 1998, this Court granted Meade's motion for summary judgment of non-infringement. (*See* Ex. C). As set forth in the Judgment entered July 2, 1999, the Court directed "the entry of a *final and appealable* judgment forthwith on the non-infringement claims in conformity herewith." (*See* Ex. C (emphasis added)). Because the Court found that Meade had not infringed, the Court rendered the invalidity issue moot. As a result, the only outstanding causes of actions are Meade's antitrust and unfair competition claims.

The non-infringement issue has been finally resolved at the district court level. The Court has adjudicated the non-infringement issue on its merits and even executed a judgment which expressly states its "finality." Accordingly, the Court's Judgment is final as stated and Reddwarf should be allowed to appeal the Court's determination of non-infringement.

B. Just Cause For Delay

Unlike the issue of finality, whether there is any just reason for delay is left to the discretion of the trial court. *Curtiss-Wright*, 446 U.S. at 8, 100 S. Ct. at 1465. Not all final judgments on individual claims are immediately appealable, even if they are in some sense separable from

the remaining unresolved claims. The function of the district court under the Rule is to act as the "dispatcher." *Sears*, 35 U.S. at 435, 100 S.Ct. at 906. It is left to the discretion of the district court to determine the "appropriate time" when each final decision in multiple claims action is ready for appeal. *Id.*

In deciding whether there are no just reasons to delay, courts also consider such factors as whether the claims under review are separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals. *Curtiss-Wright*, 446 U.S. at 8, 100 S.Ct. at 1465. The factual relatedness of separate claims for relief is one of the factors a district court considers in deciding whether to exercise its discretion to certify an appeal. *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445, 452, 76 S. Ct. 904, 909 (1956). However, factual overlap on only tangential issues or on "one aspect" of a counterclaim is not adequate to show an abuse of discretion. *W.L. Gore & Associates, Inc. v. International Medical Prosthetics Research Associates, Inc.*, 975 F.2d 858 (Fed. Cir. 1992). The Supreme Court has stated that even where there is some factual overlap of issues, other factors may justify the district court's exercise of discretion to certify an appeal in a given case. *Curtiss-Wright*, 446 U.S. at 8 n. 2, 100 S.Ct. at 1465 n. 2.

1. Personal Jurisdiction

There is no just reason to delay the appeal on the issue of personal jurisdiction. The issue of personal jurisdiction

is factually and legally separate from any other claim in this case. Even if the case goes up on subsequent appeal, an appellate court will only have to review this issue once. Moreover, this Court has ascertained that this issue could be appealed, but just not at the earlier stage in the case. Now that most of the primary issues have been determined, it is ripe for appellate review.

2. Non-Infringement

Although the non-infringement claims arise out of the same set of facts as other causes of action this case, the non-infringement claims are separate, distinct and independent of any of the other outstanding claims. In addition, non-infringement is legally separate from the other main issue of invalidity and personal jurisdiction. In fact, the only claims that share factual background as the non-infringement claims are the antitrust and unfair competition claims. Because final review of the infringement would facilitate settlement of these claims, there is no just cause for delay of appeal.

Similar to the claims in *Curtiss-Wright*, certification would not result in unnecessary appellate review; the review of these adjudicated claims would not be mooted by any future developments in the case; and the nature of the claims are such that appellate court would not have to decide the same issues more than once even if there were subsequent appeals.

IV. CONCLUSION

For the foregoing reasons, Reddwarf respectfully requests the Court grant Reddwarf's motion and expressly determine that there is no just cause for delay and expressly enter judgment in accordance with Rule 54(b).

Dated: July 26, 1999

Respectfully submitted,

s/ Gary E. Lande
OPPENHEIMER WOLFF & DONNELLY LLP

Gary E. Lande
Attorneys for Defendant/
Counterclaimant
REDDWARF STARWARE

Appendix

DECLARATION OF JAKE A. TAYLOR

1. I am an attorney with the law firm of Oppenheimer Wolff & Donnelly LLP and am one of the attorneys representing Defendant and Counterclaimant Reddwarf Starware, LLC a/k/a Reddwarf Instruments, LLC in this action. I have personal knowledge of all matters set forth herein and could testify to such facts if called as a witness at trial.

2. Attached hereto as Exhibit "A" is a true and exact copy of the Order Denying Defendant's Motion to Dismiss for lack of personal jurisdiction dated May 11, 1998.

3. Attached hereto as Exhibit "B" is a true and exact copy of the Minute Order Denying Defendant's Motion for Certification and Stay dated May 22, 1998.

4. Attached hereto as Exhibit "C" is a true and exact copy of the Judgment Granting Meade's Motions for Summary Judgment of Non-Infringement entered June 30, 1999.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 26th day of July, 1999 at Los Angeles, California.

s/ Jake A. Taylor
Jake A. Taylor